Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-115

POLISHING MACHINE SYSTEMS, INC.
JOHN A. TRICOLI, JR.
HELEN TRICOLI, and
NICHOLAS DANIELS, Petitioners,

v.

RICHARD E. COFFIN, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented to the Court for review is whether the verified complaint filed in the District Court by the respondent (the "Plaintiff" or "Coffin") states a cause of action under the Securities Act of 1933, 15 U.S.C. §77 (1971) and the Securities and Exchange Act of 1934, 15 U.S.C. §78 (1971) (collectively the "Securities Acts") by virtue of the allegation of a fraudulent sale of common stock possessing all the attributes of ordinary common stock.

HISTORY OF PROCEEDINGS BELOW

The petitioners' statements of opinions below, jurisdiction, statement of the case and rulings below are substantially correct.

STATEMENT OF MATERIAL FACTS

The petitioners' statement of material facts is substantially correct. However, the petitioners neglect to mention that in their inducement of Coffin they made use of a prospectus or offering circular entitled "A Descriptive Report Polishing Machine Systems, Inc. Petersburg, Virginia" (the "Report"). The Report was undated, but had apparently been prepared a year or two before its showing to Coffin as a sales tool to bring in additional outside capital to the corporate petitioner, Polishing Machine Systems, Inc. (PMS) in connection with a planned expansion of the company. In his complaint Coffin alleged reliance on representations made in the Report, which he later learned to be materially false and misleading.

While the District Court made

no mention of the Report in its memorandum opinion of July 28, 1977 (Petition Appendix I p. 17), the Court of Appeals held the Report indicative of PMS' desire to sell its stock to finance its planned expansion. Coffin v. Polishing Machines, Inc., 596 F.2d 1202, 1204 (4th Cir 1979) (Petition Appendix II p. 18). The Report has been reproduced as an appendix to this brief.

REASONS FOR DENYING THE WRIT

In urging the granting of a writ in this case the petitioners are unable to invite the Court's attention to conflicting authority from other Circuit Courts of Appeal because a search of the cases will disclose no support for the novel proposition they are here asserting that shares of common stock in a corporation organized for profit are not securities within the definitional sections of the Securities Acts. The petition stacks

the holding of this Court in United Housing Foundation v. Forman, 421 U.S. 837 (1975), on top of Securities and Exchange Commission v. Howey Co., 328 U.S. 293 (1946), to justify the assertion that when a shareholder becomes an active participant in the business as opposed to one merely passively investing his money with others in the anticipation of making a profit, he will be denied the protection of the Securities Acts.

Such an analysis was rightly rejected by the Court of Appeals which distinguished the Forman case by noting that although the instruments there involved were called "stock" they did not possess the attributes commonly associated with stock in a commercial sense. The Court of Appeals further determined that only after deciding that the shares in Forman were not stock in a commercial sense of the word did the Howey test of whether

the investor stood to profit from his own efforts or solely from the efforts of others apply. Coffin submits that the analysis of the Court of Appeals is consistent with the purpose and history of the Securities Acts, and provides a bright-line test that can be applied in all stock transactions where fraud is involved, whether the offerings and sales are of small amounts of shares to a multitude of investors, a substantial interest in the business with concomitant rights of membership on the board of directors and an office in the company, such as Coffin here received, or the sale of an entire business -- lock, stock and barrel. See Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc., 496 F.2d 1255 (4th Cir. 1974).

To apply the test formulated by the petitioners to the shares of PMS would mean that those shares of stock

are not "securities" because half of them were sold in a block to one improvident purchaser. If, on the other hand, the Report had been used by petitioner Tricoli in soliciting the sale of the same number of PMS shares to eight dentists from Short Hills, New Jersey, the same would by some ontological process be transubstantiated into "securities". Once such a standard were adopted each trial court would have to determine what percentage interest in the shares of a company was necessary to confer an opportunity on a purchaser to become actively involved in the management of the business; Coffin submits that such determinations would be better made my metaphysicians than by federal district judges.

CONCLUSION

In a case such as this where fraud is alleged in the offering and subsequent sale of common stock in a busi-

ness corporation the Howey test of passive investment has no applicability, because the stock falls within the clear definition of a security as defined in the Securities Acts, and the Forman test is inapplicable because the interest there alleged to be a security was not possessed of the attributes recognized of stock in the capital marketplace. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 10, 1979

CERTIFICATE

I hereby certify that on the 17th day of August, 1979, three copies of the foregoing respondent's brief in opposition to the granting of a writ of certiorari were hand-delivered to Michael S. Shelton, Esquire, COHEN, ABELOFF & STAPLES, P. C., 207 West Franklin Street, Richmond, Virginia, 23220, counsel of record for the petitioners herein, prior to the filing of same with the Clerk of this Court.

Stuart Williston Settle, Jr.

Stuart Williston Settle, Jr.

APPENDIX

A DESCRIPTIVE REPORT

POLISHING MACHINE SYSTEMS, INC.

Petersburg, Virginia

POLISHING MACHINE SYSTEMS, INC.

Petersburg, Virginia

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THE COMPANY AND ITS HISTORY

The company was founded in July of 1969 by John A. Tricoli, Jr. who presently is President and Chairman of the Board of Directors. POLISHING MACHINE SYSTEMS, INC. was incorporated in the Commonwealth of Virginia on February 6, 1970. While the charter of the company provides for wide diversification, the company was formed principally for the purpose of distributing High-Speed automobile polishing machines along with the company's line of private label waxes, chemicals and supplies.

CAPITALIZATION

The capitalization of the company was set at 300,000 shares authorized at $1.00 par value. At present there are

49,500 shares issued and outstanding, for all of which the company has received at least $1.00 per share in cash.

BUSINESS

The company distributes nationwide a High-Speed automobile polishing machine patented by Gem Industries of Livingston, New Jersey. This machine is manufactured primarily for the company by Littlestown Hardware and Foundry, located in Littlestown, Pennsylvania. The company has developed a system around the High-Speed machine consisting of waxes, chemicals, supplies, advertising material and both indoor and outdoor signs. The system enables company's customers to Simoniz polish most any automobile in 30 minutes or less featuring Simoniz paste wax. The company has successfully developed the fastest paste waxing system for the exterior of automobiles presently existing today through-

out the country. In the first four years of business the company has distributed over 2,500 units to more than 1800 accounts. The company sells reorders of waxes, chemicals and supplies to all of its present customers. The unit sells for a list price of $595.00 per kit.

METHOD OF MARKETING

The company uses direct mail as its primary source of inquiries.* Mailings are made to: Service Stations, Car Washes, New Car Dealers, Used Car Dealers and Auto Reconditioning Centers. Certain areas of the country are predetermined and then mailed. When an adequate number of inquiries are received, the company deploys teams (usually 2-man teams) in company owned van trucks containing a supply of complete sales-kit units to contact and qualify the prospects. A demonstration of the system is set up at the

*See Exhibits 1 and 2

prospect's place of business, and the sales presentation is made at this time. The company experiences a very high percentage of sales per demonstration-averaging about 70%. This high percentage is due to the rapid speed of the equipment and quality of finished job. The company offers the ultimate in the industry. The waxes and chemicals are comparable to the best on the market-headed by none less than the actual "Simoniz Super Blue".

EXECUTIVE OFFICES AND REAL ESTATE

The company on March 25, 1973, purchased approximately 1.2 acres of land and a building approximately 6000 square feet located at 2058 County Drive (Rte 460 East), in Petersburg, Virginia. To date, including improvements, the company's investment is approximately $105,000.00. A mortgage due the United Virginia Bank is about $63,000.00.

The company presently leases

three sections of the building producing an annual rent income of about $19,500.00. The cost of principal, interest, and taxes amounts to $9,250.00 per annum. The company intends to add on to the present building as soon as mortgage money rates become realistic and available. Additions obviously will add to present income. The building and land proximity is prime in that Interstates 1-95, 1-85, US 460 East and US 301 all intersect in the immediate area. Also, US 460 East is presently the main artery between the Tri-Cities of Petersburg, Colonial Heights and Hopewell and the Norfolk-Virginia Beach area.

PRESENT OFFICERS, DIRECTORS AND STOCKHOLDERS

Name/Address	Office	Shares Owned
John A. Tricoli, Jr. Resident and Homeowner 1206 Wellington Road Colonial Heights, Virginia	President/Director	29,500
William L. Hiltner Resident and Homeowner Franklin Farms Prince George, Virginia	Secretary/Treasurer Director	4,500
Mark T. Lerche Resident and Homeowner 1935 North Westchester Dr. Petersburg, Virginia	Vice-President Director	15,500

ACCOUNTING

The books and records of the company are maintained at the main office in Petersburg, Virginia. H. L. Blount & Co. had provided the accounting services from inception through the fiscal year ending June, 1973. Effective July 1, 1973, Carl W. Wells, Business Consultant and Bookkeeping, has been retained to handle the companys accounting needs. At present, all Federal and State taxes are current including the Corporate Franchise Tax;

all real estate taxes are current.

FINANCIAL REFERENCES

The company banking and financial needs are conducted at:

United Virginia Bank-Petersburg, Virginia
The Bank of Virginia-Petersburg, Virginia

THE BANK OF VIRGINIA

From 1969 through 1972, the company and officers had several loans amounting to approximately $15,000.00, all of which are paid in full. The company presently maintains a checking account there.

UNITED VIRGINIA BANK

From mid 1969 to present, the company and officers have borrowed money of approximately $100,000.00 or more. Current loan commitments amount to $13,800.00 in annual payments. At present all company loans and payment commitments are in good standing, and are paid on time. The company maintains a

checking account here.

LEGAL

Since the inception of the company, there has never been any litigation, leins, suits or claims against the company. Nicholas Daniels, Esquire, of Petersburg, Virginia, represents the company in matters requiring legal guidance.

SALES AND EARNINGS

The company, during the first fiscal year of operation, had sales of $149,854, including cash and accounts receivables. Each consecutive year since has increased the cash sales. The company has never lost money, with the exception of pre-organization and start-up expenses which has been carried forward, resulting in tax credits for the first four years of business. However, all the tax credits have been exhausted, resulting most likely in a sizable tax payment structure in the future of normal corpo-

rate tax payment bracket.

During the first four years of business, the company, due to conservative and well managed operations, has reduced liabilities to a minimum by operating on a "pay as you go" program rather than credit. Current liabilities are at an all time low. Management's guiding principal of business conduct has been "if you can't buy and pay for it-then don't sell it". However, right or wrong, this practice has paid off for the company for the first phase of operations.

TRADE REFERENCES

The company purchases machines, waxes, chemicals and supplies from the following:

Gem Industries-Livingston, New Jersey

Littlestown Hardware & Foundry-Littlestown, Pennsylvania

Texize Chemical-Simoniz Division-Atlanta, Georgia

Ren Hill Products-Irvington, New Jersey

Gamarel Electric-Irvington, New Jersey

Nation Assessories-Brooklyn, New York

Ernest Lockett Signs-Petersburg, Virginia

Modern Sign Co.-Birmingham, Alabama

Owen Printing Co.-Petersburg, Virginia

B & P Offset-Petersburg, Virginia

The above list represents the company's primary suppliers; all accounts are presently maintained on a current basis or paid in full. Over the past four years of operation, the company has enjoyed an excellent relationship with all of its suppliers.

ADDITIONAL TRADE AND CREDIT REFERENCES

The company and officers maintain presently the following list of credit cards which are necessary to do business with due to the extensive traveling throughout the country:

American Express, Diners Club, Carte Blanche, Bank Americard, Master Charge, Exxon, Gulf Oil, Texaco, Shell

Oil, Sunoco, American Oil Co., Phillips 66, Union 76, ARCO, CITGO.

All credit card accounts are maintained on a current basis and in good standing.

EXPANSION AND PROJECTIONS

Management is actively engaged in implementing the SECOND PHASE of operation. The addition of two new divisions will deal with the same products but will add a wide line of additional equipment:

A) Leasing of equipment

B) Mobile Care Care Centers

By entering into these two new fields, management is confident that a tremendous amount of sales and earnings will be realized.

A) LEASE-RENTAL OF EQUIPMENT

The company, in addition to direct sales, is planning to lease or rent the basic machines under the following conditions:

1) $100.00 security deposit
2) $25.00 rent per month
3) Direct cash sales of supplies

If the equipment is marketed under these conditions, the security deposit will more than cover the company costs in event of failure to receive payments. The cash sale of supplies will result in an immediate profit, based on sale of a full kit of $165.00 selling price. The company would realize approximately $115.00 gross cash profit. This gross cash profit will more than sustain the over-all operation. The security deposit will protect any loss resulting from default in lease or rental payments on an all-profit basis. Based on this theory, management estimates that 1000 units leased or rented would result in an income of $25,000.00 per month, resulting in hundreds of thousands in annual pro-

fits. However, increased costs in collection, bookkeeping and inventory controls are anticipated but unknown at this time. All lease contracts would have a minimun period of six months. Basically, rather than having to sell equipment for cash to dealers with limited financing, the company would be in a position to set up our average dealer for far less money than ever before. Results, unquestionably, will be many more sales.

B) MOBILE CAR-CARE CENTERS

During the past 18 months, the company has been analysing [sic] the feasibility of entering into the Mobile Car-Care Center business. Realizing the need for a low overhead reconditioning center, the company has planned a complete car-wash and car-polishing center on WHEELS. All of the required machines, equip-

ment, waxes, chemicals and supplies are installed in a van truck; work is done on the spot. Management estimates that the equipment is capable of producing $65.00 per hour using a two-man team. The company intends to engage in an active mailing and advertising program to solicit inquiries, upon which the company will demonstrate and fully train these men on the complete use of the system. A training center will be needed at the company's home office. The selling price is presently set at $3,500.00 per unit (the company cost ranges just at $1,000.00). The truck vans will be leased and the lease cost will be passed on to the purchaser. Realizing that the company for the past four years has traveled all over the country, one must thoroughly acknowledge the fact that

the company has become expertise in auto clean-up field. It is presently the opinion of the company that the Mobile Car-Care Center, fully equipped, will sell at a very brisk pace.

COMPETITION

At present there isn't any competition in this field on a nationwide basis. Management is very optimistic and enthusiastic for the high growth potential of the MOBILE CAR-CARE CENTER.

USE OF PROCEEDS AND SOURCES OF FUNDS

The company, in order to add the two expansion programs, has estimated the need of approximately $150,000.00. The intention is to raise the necessary funds from the sale of 50,000 shares of common stock.

The funds will be used in the following manner:

A) Lease-rental operation

1) Addition of 500 complete units to present inventory.

2) Addition of 10 new sales representatives.

3) Addition of 10 vehicles.

4) Addition to present mailing and advertising.

B) Mobile Car-Care Center

1) Starting inventory of 10 complete van trucks-set up with complete Car Care equipment.

2) Create Car Polishing Training Center.

3) Expanded advertising and mailing program.

4) Addition of following personnel-

a/ Training Instructor
b/ Demonstrators

C) All remaining funds to be used as additional working capital.